Nos. 87-1589 and 87-1888

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The State of South Dakota will address the following questions presented by these cases:

1. Does the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, prohibit a railroad from consummating a decision to sell its rail lines until it completes bargaining with its employees' representatives under the procedures of the Act over their demands for certain protections from the adverse effects of such sale?

2. Whether Section 4 of the Norris-La Guardia Act, 29 U.S.C. § 104, prohibits courts from enjoining strikes protesting a railroad's decision to sell its rail lines.

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INTEREST OF THE STATE OF SOUTH DAKOTA

South Dakota has a vital interest in the issues presented in this case. South Dakota has taken an active role, perhaps more than any other state, in preserving rail service, and it believes the issues in this case are of critical importance to the future of our national rail system. Moreover, the resolution of those issues in this case will directly affect the outcome of a similar transaction involving the sale of a major rail line in South Dakota. As in this case, the Railway Labor Executives' Association (RLEA) brought suit to enjoin the sale of that South Dakota line. Because South Dakota believed that the claims of rail labor, if sustained, would have prevented

that sale and led to the eventual abandonment of the line, it filed briefs as amicus curiae in support of the railroad parties in the district court, the court of appeals and in this Court. See *RLEA v. Chicago & North Western Transp. Co.*, 848 F.2d 102 (8th Cir. 1988), *petition for cert. filed*, No. 87-2049. This Court is holding the petition for certiorari in No. 87-2049 pending its consideration of the same issues in this case.

Adequate rail transportation is vital to South Dakota. South Dakota is one of the nation's leading agricultural producing states, and the transportation of those products, principally corn and wheat, to eastern and western markets is and must be principally by rail. South Dakota's rail lines are also extremely important for the movement of coal across the country. In addition, South Dakota's cement and wood products industries, located in the western part of the State, depend on rail transportation to reach many of their markets.

Major bankruptcies and other misfortunes that have plagued the railroad industry in recent years have left South Dakota particularly vulnerable and have necessitated unprecedented efforts by the State to preserve essential services. These have included the acquisition and rehabilitation of almost 900 miles of track abandoned by the bankrupt Chicago, Milwaukee, St. Paul and Pacific Railroad, which the Burlington Northern Railroad now operates for the State under lease and operating agreements.

The other rail system in South Dakota is the one that is the subject of the petition in No. 87-2049. It is one of the two major east-west lines in the State. It was formerly owned by the Chicago and North Western Transportation Company ("C&NW"), and it runs from Rapid City eastwards through Brookings, South Dakota, to Winona, Minnesota. In 1986 C&NW agreed to sell this line, associated branch lines and related trackage rights,

totalling 966 miles, to a newly formed company, The Dakota, Minnesota & Eastern ("DM&E"), which is now headquartered in Brookings, South Dakota. The major portion of the lines and trackage rights that were sold, almost 600 miles, are in South Dakota.

This line carries a substantial portion of South Dakota's produce. For several years, however, operations over the line as a whole by C&NW were only marginally profitable and the State was greatly concerned with its long term viability. In 1984 C&NW applied to the Interstate Commerce Commission to abandon the 150 mile segment from Pierre to Rapid City. The ICC denied C&NW's application by an evenly divided vote notwithstanding a showing of losses of $2 million annually by C&NW.

Because of the line's marginal, and on some segments negative, contribution to revenue, C&NW invested only minimally in the rehabilitation and maintenance of this line. The resulting deterioration of the track in turn led to the diversion of a substantial amount of overhead traffic to more circuitous routes through Nebraska and Iowa, which further diminished the line's revenue. Although deterioration of the line was a matter of great concern to the State, its total abandonment would, of course, have been far worse, not only for the shippers who depend on it but also for the railroad employees who work on it.

In South Dakota's judgment, the sale of the C&NW line to a locally based regional railroad like DM&E was clearly the optimal solution for shippers, employees and the public in general. Since commencing operations in 1986, the DM&E has not only maintained the endangered rail service but has taken significant steps to improve it. The first of these steps has been to commence a $20 million track rehabilitation program which should recover much of the overhead traffic that has been lost in recent years. Furthermore, as a regional carrier based in the

State, DM&E's actions have already indicated a more permanent commitment to the needs of shippers in the State and has given them a competitive alternative that would have been lost if the line had been abandoned. Finally, and perhaps most importantly, DM&E hired 101 of the 169 former C&NW hourly employees employed on the line, and these are jobs that would have been lost altogether if the line had been abandoned.

Nevertheless, RLEA filed suit on behalf of C&NW's employees and their unions [1] to enjoin the sale. RLEA contended, as it has consistently in most such sales in recent years, that the sale of the line would amount to a change in the "status quo;" accordingly, it argued that under the scheme of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, the C&NW could not consummate the sale until it completed bargaining with the unions over their demands that C&NW provide them and require DM&E to provide them with the same protections that the ICC imposes on railroads as a condition of its approval of certain transactions, such as railroad mergers and abandonments.[2] Although the ICC had specifically determined not to impose such protections with respect to the particular transaction involved in the C&NW case—the sale

[1] RLEA is an association of all the unions representing railroad employees. Unlike employees in most industries, railroad employees are represented by unions on a craft-by-craft basis. Railroad employers are therefore usually required to bargain and reach agreements with numerous unions representing their employees.

[2] In the case of abandonments these protections are known as *Oregon Short Line III* protections, and they are set forth in *Oregon Shore Line R.R.—Abandonment*, 360 I.C.C. 91 (1979). In the case of mergers, the protections, known as *New York Dock* protections, are set forth in *New York Dock Ry.—Central—Brooklyn T.D. Terminal*, 360 I.C.C. 60, *aff'd*, 609 F.2d 83 (2d Cir. 1979). In both cases, those protections require railroads that are parties to a covered transaction to pay for up to six years the average pre-transaction monthly wages of employees who are dismissed or displaced to a lower paying job because of the transaction.

of a railroad line to a new enterprise [3]—RLEA argued that the unions were nevertheless entitled to bargain for such protections and that the transaction could not be consummated until such bargaining had been completed.

It was apparent to South Dakota that RLEA's position, if sustained, would have two consequences. The "short" term consequence would be that C&NW and DM&E would be legally precluded from consummating the sale until the completion of what this Court has described as the "almost interminable" bargaining process under the Railway Labor Act.[4] The longer term and more fundamental consequence of RLEA's position was that it would foreclose the sale as a practical matter because, as the ICC has found to be generally the case in this class of cases, the cost of the labor protection sought by the unions was almost certain to make the transaction too expensive for the buyer in light of the traffic and anticipated revenues.[5]

In the *C&NW* case, the district court denied RLEA's requested preliminary and permanent injunctions, holding that the relief sought by RLEA would conflict with the ICC's decision to exempt this class of transactions from ICC jurisdiction and not to impose labor protective conditions with respect to them. See Pet. No. 87-2049 App. 9a-10a. The United States Court of Appeals for the Eighth Circuit affirmed, holding that "the provisions of the [Interstate Commerce Act] governing labor protective agreements supersedes the mandatory bargaining requirements of the [Railway Labor Act]." 848 F.2d at 104. As a result, the sale was consummated, and DM&E has been operating the line since September 1986.

[3] *Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 1 I.C.C. 2d 810 (1986) (hereinafter "*Ex Parte 392*").

[4] *Detroit & Toledo Shore Line R.R. Co. v. Transportation Union*, 376 U.S. 142, 149 (1969).

[5] *See Ex parte No. 392*, 1 I.C.C. 2d at 815.

In the instant case, however, the Third Circuit reached the opposite conclusion. In the decision under review in No. 87-1888, the Third Circuit upheld an injunction against consummation of a line sale to a new enterprise. It held that the Railway Labor Act precluded the Pittsburgh & Lake Erie Railroad Company (P&LE) from selling its entire line until it completed bargaining over its unions' demands for protective conditions, and it held that the Interstate Commerce Act and the ICC's decisions pursuant to it did not supersede the pertinent provisions of the Railway Labor Act. In an earlier decision in the same case, under review in No. 87-1589, the Third Circuit held that federal courts are precluded by the Norris-La Guardia Act, 29 U.S.C. § 101 *et seq.*, from enjoining strikes protesting such sales.

If the Third Circuit's decisions are sustained and applied to the sale of the C&NW's line in South Dakota to the DM&E, the result would be likely to have a very adverse effect on rail transportation in the State. More generally, South Dakota believes that the Third Circuit has misconstrued the requirements of the Railway Labor Act as applied to this kind of line sale, and it submits that that error, if not corrected, will continue to stand as a major obstacle to efforts to preserve rail service over many lines throughout the country that could otherwise be saved.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the Railway Labor Act prohibits a railroad from consummating a sale of its lines until it completes bargaining with its unions over their demands for protections from the effects of the sale on employees.

a. The Railway Labor Act only requires collective bargaining with respect to "rates of pay, rules and working conditions." 45 U.S.C. § 152, First. This Court has held that under the similar provisions of the National Labor Relations Act an employer is not required to bar-

gain with its employees' representatives with respect to the employer's decision to terminate part of its business. *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981). The Court held that such decisions, despite their direct effect on employees as a result of the necessary elimination of jobs, are exclusively for management to make and that subjecting these decisions to collective bargaining would unduly interfere with management's necessary functions. All of the Court's reasons and conclusions in *First National Maintenance* apply fully to a railroad's decision to sell all or part of its business and to its bargaining obligations.

b. Although the court of appeals purported to accept the proposition that a railroad's decision to sell its lines is not a mandatory subject for collective bargaining, it effectively reached the opposite result by holding that the railroad is nevertheless required to bargain about the "effects" of the sale—*i.e.*, the concomitant elimination of jobs—and to complete such bargaining before consummating the sale. This was error. Any obligation to bargain about the "effects" of management's decision to terminate part of the business cannot reasonably be held to include an obligation to bargain about consequences that are a necessary result of such a decision because such bargaining would amount to bargaining about the decision itself. Nor should employers be required to bargain over demands that would necessarily preclude the decision as a practical matter. *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 558-59 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972). As the ICC has found to be generally true in line sales of this kind, the demands of P&LE's unions for protections from the adverse effects of its sale would preclude the transactions as a practical matter and therefore should not be a subject of mandatory bargaining.

c. Even if railroads had an obligation to bargain about the effects of line sales on employees, the court of

appeals erred in holding that such bargaining must occur and be completed before the sale itself takes place. This conclusion was based on a misconception of the "status quo" requirements of the Railway Labor Act, and the necessary consequence of the court's error is to give unions an effective veto over decisions that should be exclusively management's to make.

2. The court of appeals also erred in holding that Section 4 of the Norris-La Guardia Act, 29 U.S.C. § 104, prohibits courts from enjoining strikes undertaken to protest railroad line sales. Allowing such strikes is contrary to the basic scheme and purpose of the Railway Labor Act and the Norris-La Guardia Act to prevent industrial unrest by requiring bargaining over appropriate subjects. If the Court agrees that unions' demands in this case are not mandatory subjects of bargaining, then strikes in protest of the underlying sale should not be held to be arising out of a "labor dispute" to which the Norris-La Guardia Act's ban on injunctions applies. If it holds that they are subjects for mandatory bargaining, however, then such strikes would violate the Railway Labor Act's procedures for resolving major disputes, which violation may be enjoined under well established authority. See, *e.g.*, *Chicago & N.W.R. Co. v. Transportation Union*, 402 U.S. 570, 581 (1971).

ARGUMENT

I. THE RAILWAY LABOR ACT DOES NOT PROHIBIT RAILROADS FROM SELLING ALL OR PARTS OF THEIR LINES UNTIL AFTER THEY COMPLETE BARGAINING WITH THEIR EMPLOYEES ABOUT THE EFFECTS OF SUCH SALES ON EMPLOYEES

In the decision under review in No. 87-1888 the Third Circuit addressed two principal issues: first, whether the Railway Labor Act precludes a railroad from consummating a decision to sell its rail lines until it finishes bargaining with its employees about their demands for

certain protections from the adverse effects of that sale; and second, if so, whether the provisions of the Interstate Commerce Act and ICC decisions thereunder that authorize the railroad to consummate the sale without providing such protections supercede and, in effect, override any requirements and restrictions that the Railway Labor Act would otherwise impose. The Third Circuit devoted substantial attention to the second question, and other courts, including the Eighth Circuit in the *C&NW* case have focused primarily upon it. South Dakota believes, however, that the first question is the more fundamental and important question. Indeed if the Court agrees with South Dakota's submission that the court below erred in holding that the Railway Labor Act prevents the P&LE from selling its lines until it completes bargaining over its unions' demands for protective conditions, there would be no reason for the Court to attempt to resolve the difficult questions concerning the effect of the Interstate Commerce Act and ICC decisions on employees' rights under the Railway Labor Act in this context.[6]

The Railway Labor Act really presents three separate questions that must be resolved in this case. The first is whether a railroad's decision to sell all or part of its lines is a mandatory subject of collective bargaining under the Act. On this question, in fact, there does not appear to be much dispute; the court below at least purported to agree that the decision to sell was itself not a mandatory subject of bargaining, and the RLEA does not appear to contend otherwise. The second and more important question is what *effects*, if any, on employees

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[6] Furthermore, the ICC issues, though important, are limited in application to railroads and to particular types of transactions—sales by railroad of rail lines to noncarriers that are pursuant to 49 U.S.C. § 10901 and are subject to the ICC's class exemption under *Ex Parte 392*. The Railway Labor Act issues, in contrast, apply to both railroads and airlines and are relevant to the general class of decisions involving the sale or termination of major segments of a business.

of the decision to sell must the selling railroad bargain about. The third, and perhaps most important, question is *when* the railroad must bargain about whatever effects of its decision to sell are mandatory subjects of bargaining. We address each of those questions in turn.

A. A Railroad's Decision To Sell All Or Part Of Its Lines Is Not A Mandatory Subject Of Bargaining Under The Railway Labor Act.

The Railway Labor Act requires railroads to bargain with the representatives of their employees about "rates of pay, rules, and working conditions." 45 U.S.C. § 152, First. It does not, however, require them to bargain about every matter that affects the interests of employees. For example, a decision to change the rates charged to shippers or to adopt a new plan of capitalization or to elect a new chairman of the board of directors are all decisions that may affect the welfare of the enterprise, and thus of its employees, but they are clearly not, it is submitted, matters that the Railway Labor Act requires management to bargain about with its employees. See *Japan Air Lines Co. v. International Ass'n of Machinists*, 538 F.2d 46, 52-53 (2d Cir. 1976) (no duty to bargain over decision to continue subcontracting maintenance work); *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 556-57 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972) (no duty to bargain over merger decision and its effects on employees).

Although there are a number of important differences between the Railway Labor Act and the National Labor Relations Act, 29 U.S.C. § 158 *et seq.*, the scope of the bargaining obligations under the two statutes are very similar; under the Railway Labor Act, bargaining is required with respect to "rates of pay, rules and working conditions," and under the National Labor Relations Act, it is required "with respect to wages, hours and other terms and conditions of employment." 29 U.S.C. §§ 158(a)(5) and 158(d). Accordingly, South Dakota submits that this Court's decisions delineating the scope of the bargaining obligation under the National Labor Relations Act are also pertinent to that issue under the Railway Labor Act. Those decisions, moreover, clearly indicate that a railroad's decision to sell all or part of its lines is a decision exclusively for management and is not a mandatory subject of collective bargaining.

The most pertinent of this Court's decisions is *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), which held that a company's decision to terminate part of its business was not a mandatory subject of bargaining under the National Labor Relations Act. The Court observed that "in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed." 452 U.S. at 676. Although the Court recognized that a decision to terminate part of a business has a direct and immediate impact on employees because elimination of jobs is a necessary consequence, it also noted that the grounds for that decision are wholly unrelated to the employment relationship and are based solely on considerations of the "economic profitability" of the terminated business. *Id.* at 677. The Court held that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business." *Id.* at 678-679. It further concluded that subjecting business termination decisions to the collective bargaining process would unduly interfere with management's necessary functions, stating that

> [m]anagement may have great need for speed, flexibility and secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the

> corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer also may have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss. . . .
>
> Labeling this type of decision mandatory could afford the union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose.

Id. at 682-683 (footnotes omitted).

All of the Court's observations and conclusions in *First National Maintenance Corp.* are fully applicable to decisions by railroads to sell or terminate all or part of their operations, and specifically to P&LE's decision in this case. Nor is there anything in the text, structure or purpose of the Railway Labor Act that would warrant a different conclusion with respect to the obligations of railroads and airlines to bargain about such basic management decisions as whether to terminate all or part of the business.[7] The Third Circuit itself at least purported

[7] In a footnote in *First National Maintenance* the Court stated that the "mandatory scope of bargaining under the Railway Labor Act . . . [is] not coextensive with the National Labor Relations Act . . . ." 452 U.S. 686-687, n. 23. The Court did not indicate how or why the bargaining obligations might be different under the two Acts, and South Dakota believes the Court's statement should not be read to suggest that the kind of business termination decisions involved in *First National Maintenance* would be a subject of mandatory bargaining under the Railway Labor Act. The statement was made in the context of rejecting the reliance of amicus AFL-CIO on *Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330 (1960), which held that a union was entitled to request to bargain over a railroad's decision to close certain stations, thereby eliminating jobs. As discussed more fully below, the railroad's decision in *Railroad Telegraphers*, however, was far more limited in scope and different in nature from the decisions of the employer in *First National Maintenance* or of P&LE in this case. *Railroad Telegraphers* does not support the conclusion that decisions like those of P&LE are subject to mandatory bargaining.

to agree that there is no such obligation under the Railway Labor Act when it stated: "We agree, and the union apparently concedes, that the railroad has no obligation to bargain over the underlying decision itself, *viz.*, to cease operating as a railroad and to sell its rail assets. See *First National Maintenance*, 452 U.S. at 686, 101 S.Ct. at 2584." *RLEA v. Pittsburgh & Lake Erie R.R. Co.*, 845 F.2d at 420, 431 (3d Cir. 1988).

Despite its statement, however, the Third Circuit's decision effected precisely the opposite result through its ruling concerning the railroad's obligations to bargain about the "effects" of its decision to sell, as we now discuss.

B. A Railroad's Obligation To Bargain About The "Effects" Of A Management Decision Does Not Require Bargaining Over Demands That Would Necessarily Preclude Such A Decision.

In *First National Maintenance* this Court held that management was not required to bargain about its decision to terminate part of its business, but it also stated that "[t]here is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by § 8(a)(5)." 452 U.S. at 681. The Third Circuit in this case relied on that statement to hold that P&LE was required to bargain about the effects of its decision to sell its business before it could consummate that sale, and that the principal "effect" of the sale which it had to bargain about was the abolition of jobs resulting from the sale. 845 F.2d at 430-431. Thus the court below stated: "[W]hen a decision affects the very exist-

ence of the workers jobs, the RLA mandates bargaining." 485 F.2d at 430.[8]

This Court in *First National Maintenance* did not explain precisely what effects of a management decision would be mandatory subjects of bargaining, although it referred to bargaining over such matters as severance pay, notice and provision of information to employees. 452 U.S. at 677-678 n.15, 682. The issue, however, is critical in this case. South Dakota submits that the court of appeals erred in concluding that the effects of a decision to terminate all or part of a business that must be bargained about include the elimination of jobs that necessarily result from that decision. The necessary and inescapable consequence of any such conclusion would be simply to nullify the basic holding of *First National Maintenance* that the business termination decision itself is not subject to mandatory bargaining. That is so because the decision to eliminate a segment of a business and the decision to eliminate the jobs involved in that segment are, in fact, the *same thing*. To say, as the court below did, that the employer must bargain over "job security" and the preservation of jobs is simply another way of saying the employer must bargain about the decision to close that part of the business.

Indeed in *First National Maintenance* this Court clearly recognized that the decision to close part of a business and the decision to eliminate jobs are, in effect, the same decision, as to which bargaining is not mandatory. Thus the Court stated that "[t]he present case concerns a . . . type of management decision . . . that had a direct impact on employment, since jobs were inexorably eliminated by the termination . . . ." 452

[8] The court further stated: "It seems to us that, if workers can insist on *bargaining to preserve jobs* when the railroad proposes to abandon certain stations, they similarly can demand bargaining when the railroad proposes to abandon its ownership of an entire line." 845 F.2d at 430 n. 12 (emphasis supplied).

U.S. at 677. Because of the inevitable elimination of jobs, the Court found that bargaining over the termination decision would not serve the Act's purposes in fostering the exchange of information and suggestions between labor and management because "[t]he union's practical purpose in participating . . . will be largely uniform: it will seek to delay or halt the closing." 452 U.S. at 681. The Court also recognized that the decision to terminate was based on economic (*i.e.*, cost) considerations, and it was surely aware that the major element of the employer's costs in that case was its labor costs. In sum, the clear import of the Court's decision was that management was not required to bargain about its decision to terminate or about the elimination of jobs that would necessarily result from that decision.

Although the Third Circuit recognized, and indeed regretted, that the consequence of its decision was to give the unions an effective veto over the sale itself, contrary to *First National Maintenance*,[9] it concluded that that result was compelled by this Court's earlier decision under the Railway Labor Act in *Railroad Telegraphers Union v. Chicago & N.W.R. Co.*, 362 U.S. 330 (1960). South Dakota submits that *Telegraphers* does not require the result the court below reached in this case. In *Telegraphers* the Court held that a union was entitled to request bargaining with respect to a railroad's decision to close certain stations. Plainly, however, the myriad decisions involved in a business enterprise fall along a spectrum ranging from those that are clearly appropriate for collective bargaining, such as wages and hours, and

[9] Thus the court stated: "We concede that P&LE has made a powerful argument, for imposing the RLA requirements in this situation may well have the practical effect of torpedoing the sale." 845 F.2d at 429. It also acknowledged and did not deny PL&E's claim that the effect of the district court's injunction was to give the unions "a powerful tool for delay," contrary to this Court's teaching in *First National Maintenance*. 845 F.2d at 431.

those that are not. Many decisions in the middle may not be readily classified in one category or another, and in South Dakota's submission the station closing decision involved in *Telegraphers* was one such decision. In any event, however, the scope and nature of that decision were very different, and far more limited, than the decision of P&LE in this case to sell all of lines or the decision of C&NW in No. 87-2049 to sell a 900-mile segment of its system. *Telegraphers*, in essence, involved a railroad's adjustments to its ongoing operations, not a decision to terminate them altogether.

While it seems clear that the "effects" of a business termination decision which management must bargain about should be held not to include the elimination of jobs necessarily resulting from that decision, South Dakota submits more generally that "effects" should be held not to include bargaining with respect to any demands which would necessarily prevent the decision itself. The reason is the same. If unions could insist on bargaining over demands that would, as a practical matter, preclude the transaction, they would, in effect, be bargaining over the transaction itself.[10]

This is precisely the conclusion the First Circuit reached in *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972), which the Court cited with approval in *First National-Maintenance*, 452 U.S. at 683, n.20. In *Northeast Airlines*, the union sought to delay the company's impending merger pending bargaining over the merger decision and the effects thereof. 473 F.2d at 551-52. The First Circuit rejected the union's contentions, holding that the decision to merge

[10] If, for example, unions could insist on bargaining about the "effects" on employees of the selection of a new board chairman by demanding lifetime job protection from any business termination decisions he might make in the future, they would in effect be bargaining over the selection itself.

was not a subject of mandatory bargaining. *Id.* at 557. Allowing the union to bargain over the merger would

> infringe greatly upon [the company's] control over [its] investment. Moreover, the nature of the decision itself makes it excessively burdensome to bring the union into the decision-making process. . . . [M]erger negotiations require a secrecy, flexibility and quickness antithetical to collective bargaining.

Id. (citation omitted).

More importantly, the *Northeast Airlines* court recognized the collision that is inevitable when the scope of "effects" bargaining is given too broad an interpretation.

> To allow the Union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place. We have no doubt but that an employer, bargaining about the effect of a relocation on employment conditions, could refuse to discuss as unreasonable any labor protective terms that would make it prohibitively expensive to move. Where it is clear, as in the case of a merger, that bargaining about some effects of the decision would be ineffectual unless the company could be required to renegotiate the merger, we believe that the duty to bargain about those effects does not arise at all.

Id. at 558-59 (citation omitted).

It is, of course, not possible to state as a general matter what demands would necessarily foreclose decisions that are exclusively management's to make; that determination will require judgments on a case-by-case basis. In this case, South Dakota submits that the demands made by P&LE's unions, like those of C&NW's unions in No. 87-2049, are clearly ones that would preclude the decisions of management as a practical matter.

Moreover, in this class of cases there is a solid and authoritative basis for that conclusion—namely the determination of the ICC in *Ex Parte No. 392* and the findings on which that determination was based. In *Ex Parte No. 392* the ICC concluded that the employee protections that it normally imposes as a condition of railroad abandonments and mergers should as a general rule *not* be imposed on either the selling or purchasing party in line sales under 49 U.S.C. § 10901. That conclusion was grounded on its determination, based on its expertise and long experience with this class of transactions, that such transactions usually involve unprofitable or marginally profitable lines and that the imposition of standard labor protections, which have been described by the courts as "costly" and "onerous," [11] would usually impose too great a cost on the new enterprise, and therefore preclude most such transfers as an economic matter, contrary to the strong public interest in encouraging them. 1 I.C.C. 2d at 813-814. A major contributing cause to the uneconomic or marginal status of such lines are the labor costs of the selling railroad, which the new companies can usually reduce unless they must bear the costs of labor protection. Accordingly, the ICC decided not to impose those labor protections in § 10901 transactions as a general matter, although its *Ex Parte 392* procedure gives employees an opportunity to show that such protections are appropriate in particular transactions.

In this case and in this class of cases, however, the unions are demanding, in the guise of "effects" bargaining, the very employee protections that the ICC has found will generally preclude the transaction as a practical matter. In South Dakota's submission, bargaining over those kind of demands amounts, in practical effect, to bargaining over the transaction itself and is therefore not required by the Railway Labor Act.

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[11] *Simmons v. ICC*, 760 F.2d 126, 131 (7th Cir. 1985).

C. The Railway Labor Act Does Not In Any Event Require Employers To Complete "Effects" Bargaining Before Undertaking Business Termination Decisions.

If this Court concludes, contrary to the foregoing submission, that the Section 6 notices filed by P&LE's unions present mandatory subjects of bargaining, the critical question becomes *when* such bargaining must take place. South Dakota submits that even on the assumption that P&LE must bargain over the demands set forth in the Section 6 notices, the Third Circuit erred in holding that P&LE is precluded from consummating the sale until it completes the bargaining process pursuant to the procedures of the Railway Labor Act.[12] Again, as the Third Circuit itself recognized, that result effectively negates the proposition that the business termination decision itself is not a subject of mandatory bargaining. Its decision, however, is based upon a fundamental misunderstanding of the status quo requirement of the Railway Labor Act, and it has unjustifiably led to the virtual cessation of such transactions within the rail industry.

The Third Circuit based its decision on the status quo requirement contained in the Railway Labor Act, which provides that the parties may not unilaterally alter the "rates of pay, rules or working conditions." 45 U.S.C. § 156. This status quo requirement, as it has become known, includes not only those terms included in the collective bargaining agreement, but also those "actual, objective working conditions" that past practice or custom have established. *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 153 (1969). The Third Circuit applied this standard in such a fashion so as to require that all conditions be frozen as of the

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[12] Indeed it is noteworthy that P&LE itself has taken the position that it is willing to bargain about those demands, but that it need not do so before the sale is consummated.

time the union served its section 6 notices. This is clearly erroneous.

The status quo does not require that the carrier's operations be frozen as of the time when the major dispute arose. Rather, the carrier's activities continue and actions which it takes are subject to those terms and conditions of the collective bargaining agreement and any other longstanding practices.

Cases defining the status quo under the Railway Labor Act have recognized that the status quo requirement does not mandate the absolute freeze in conditions that the Third Circuit held to be necessary. In *Detroit & Toledo*, on which the Third Circuit mistakenly relied, the company sought to make outlying assignments, a practice not covered in the existing collective bargaining agreements nor done in the past. *Id.* at 154. The Court held that the railroad could not make the new assignments without violating the status quo. *Id.* The company, however, could have made those new assignments if they had had a previous practice of making such outlying assignments without violating the status quo even though the subject was being bargained over. *Id.* at 153-54. Thus, *Detroit & Toledo* does not prohibit company activity just because the union seeks to bargain over it. If the activity is allowed by agreement or custom, it may occur until or unless the parties reach an agreement to the contrary.

Cases since *Detroit & Toledo* have consistently followed this reasoning. In *United Transp. Union v. St. Paul Union Depot Co.*, 434 F.2d 220 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971), the union sought to add to the collective bargaining agreement a provision requiring negotiation before the company abolished any jobs. *Id.* at 221. Before the court, the parties stipulated that an established practice existed that allowed the company to unilaterally abolish jobs. *Id.* at 223. Accordingly, the

court held that the abolishment of positions while bargaining was taking place did not violate the status quo because the railroad could always abolish jobs. *Id.* If the company were prevented from abolishing jobs, the status quo would, in fact, be changed. *Id.*

Similarly, in *Baker v. United Transp. Union*, 455 F.2d 149 (1st Cir. 1971), the company changed examination sites for its employees. *Id.* at 153. The company took this action while negotiating with the union over the issue of examination sites and the union protested this action as a violation of the status quo. *Id.* The court found that the company had a previously established practice of changing examination sites and thus its action did not violate the status quo:

> If management had had the ability of freely changing examination sites before the notice, depriving it of that ability and requiring that it continue examination sites then in existence throughout the long, deliberately drawn out process of negotiations and mediation under the Act, would not be a continuation of any prior existing condition. It would be the creation of a new condition.

Id. at 157.

It is clear and undisputed that P&LE has always had the *ability* to go out of business or to sell all or part of its lines, and thus to eliminate jobs as a necessary concomitant of those actions. See, *e.g.*, *First National Maintenance*, 452 U.S. at 677; *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 257, 268 (1965). RLEA has never contended otherwise. The collective bargaining agreements contain no limitation on this right nor does any established practice limit the right to go out of business. This management prerogative to determine the scope and very existence of its business *is* the status quo.

The injunction issued in this case, however, completely stands the status quo requirement on its head. It in fact

alters the status quo just as the unions unsuccessfully attemped to do in *St. Paul Union Depot* and *Baker*. The Third Circuit has ordered that P&LE refrain from terminating its operations, something it has always been able to do under existing agreements and practices. The unions admit by their very actions in federal court that they are seeking to change P&LE's ability to terminate its business. Preventing the sale alters the status quo.

Cases arising under the National Labor Relations Act illustrate the correct application of the status quo requirement in effects bargaining situations. Like the Railway Labor Act, the National Labor Relations Act provides that the parties may not unilaterally change the terms and conditions of employment when mandatory subjects of bargaining are being negotiated. *NLRB v. Katz*, 369 U.S. 736, 742 (1962). Yet this status quo requirement does not act to delay a company's sale of its business. Effects bargaining may occur and does occur *after* the sale is completed. See, *e.g.*, *Parker v. Conners Steel Co.*, 855 F.2d 1510, 1514 (11th Cir. 1988); *Vitek Electronics, Inc. v. NLRB*, 763 F.2d 561, 566 (3d Cir. 1985).

It is even more critical that effects bargaining be allowed to occur after the completion of sales in transactions by carriers governed by the Railway Labor Act. The status quo requirement of the National Labor Relations Act, like the Railway Labor Act, only applies until impasse is reached. *Katz*, 369 U.S. at 742. Under the National Labor Relations Act, however, impasse may be reached relatively quickly, *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 108 S.Ct. 830, 833 n.5, whereas the Railway Labor Act requires what this Court has termed an "almost interminable proces" of negotiation.[13] Consequently, to require effects bargaining before the decision to sell can be implemented is to give labor a complete veto over such deci-

[13] *Detroit & Toledo*, 396 U.S. at 149.

sions, and the decision below has had the predictable effect of blocking virtually all transactions for the past nine months. Few buyers are willing to wait around for a couple of years to buy a multi-million dollar business.

In sum, the status quo is P&LE's existing right under law and its collective agreements to sell its lines and go out of business. The injunction which now prevents the sale from going forward does not preserve the status quo but violates it.

II. THE NORRIS-LA GUARDIA ACT DOES NOT PROHIBIT INJUNCTIONS TO PREVENT STRIKES TO PROTEST A RAILROAD'S SALE OF ITS LINE

For the reasons previously discussed, the questions concerning the scope of a railroad's bargaining obligation in connection with a sale of its lines are extremely important to the future of the national rail system. An equally important question is the one presented by the Third Circuit's decision in No. 87-1589: whether Section 4 of the Norris-La Guardia Act, 29 U.S.C. § 104, prohibits courts from enjoining strikes in protest of such sales. That question is critical because even if the Court holds that these sales are not mandatory subjects of bargaining under the Railway Labor Act, or that the Railway Labor Act permits such sales to be consummated prior to bargaining about their effects, most such sales would not be feasible if unions were free to strike in order to exact the desired conditions by that means.

In South Dakota's submission, the Norris-La Guardia Act does not preclude enjoining such strikes for two reasons. First, that Act only bars injunctions "in any case involving or growing out of a labor dispute . . . ." 29 U.S.C. § 104. If the Court finds that the line sales and their effects are matters committed exclusively to management and are not mandatory subjects of bargaining, then strikes over such matters should be held not to be ones that grow out of a "labor dispute" within the mean-

ing of the Norris-La Guardia Act. To conclude that employees may strike over matters they have no right to bargain about with management would frustrate the basic purpose and design of the Railway Labor Act to promote industrial peace by defining, in a broad but not unlimited fashion, those subjects about which management must bargain about with labor and by carefully prescribing the mechanisms for resolving disputes over these matters. The Norris-LaGaurdia Act complements that scheme by ensuring that, in cases in which the bargaining and mediation process finally results in impasse, employees are free to use their economic power by striking to obtain their ends. The Norris-La Guardia Act was not enacted to allow employees to strike over matters that are not appropriate subjects of collective bargaining. See *Japan Air Lines*, 538 F.2d at 52-53.

Second, if the Court concludes that the effects of line sales are mandatory subjects of bargaining under the Railway Labor Act but that the railroad may consummate the sale prior to completing such bargaining, then any strike over the matter would violate the Railway Labor Act's major disputes provisions. It is well established that the Norris-La Guardia Act does not preclude injunctions issued to enforce the provisions and procedures of the Railway Labor Act. See, *e.g.*, *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 107 S.Ct. 1841, 1851 (1987); *Chicago & N.W.R. Co. v. Transportation Union*, 402 U.S. at 581.

CONCLUSION

The decisions of the court of appeals should be reversed.

Respectfully submitted,

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